Filed 6/26/15 In re Alex P. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ALEX P., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ALEX P., Defendant and Appellant.	G050325 (Super. Ct. No. DL049253-001) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard Y. Lee, Judge. Affirmed as modified.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Kristine Gutierrez and Allison V. Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Alex P. appeals from a judgment declaring him a ward of the juvenile court pursuant to Welfare and Institutions Code section 602 and committing him to juvenile hall or other appropriate facility for two days with credit for two days served, and placing him on probation. The court found that Alex had committed an assault with a deadly weapon when he threw a skateboard toward his victim, and committed vandalism when the skateboard struck and damaged the victim's computer monitor. Alex's maximum term of confinement was set at one year, four months.

Alex argues the judgment must be reversed because the court itself concluded the prosecution's evidence was insufficient to support a finding his assault on the assistant principal of his school with a skateboard was likely to produce great bodily injury, and thus it erred by denying his motion to dismiss the count alleging he committed an aggravated assault with a deadly weapon. He also argues: (1) the evidence was insufficient to support the court's finding that he had committed misdemeanor vandalism; (2) the probation condition requiring suspension of his drivers' license for a period of 365 days must be stricken because there was insufficient evidence demonstrating the suspension was directly related to the criminal conduct at issue in this case; and (3) the court erred by setting a maximum term of commitment, even though Alex was never removed from the custody of his guardian.

We modify the judgment to reflect a finding of simple assault, rather than a finding of assault with a deadly weapon, and affirm the judgment as so modified.

FACTS

The district attorney filed a juvenile delinquency petition alleging three counts: Count 1was aggravated assault with a deadly weapon, i.e., a skateboard (Pen. Code, § 245, subd. (a)(1)); count 2 was assault by means of force likely to produce great

bodily injury (Pen. Code, § 254, subd. (a)(4)); and count 3 was misdemeanor vandalism. (Pen. Code § 594 (a) and (b)(2)(A).).

The evidence introduced by the prosecutor at trial established the following: In April 2014, Alex was a high school student in Santa Ana. He violated his school's policy against cell phone use in the classroom, and as a consequence, his phone was confiscated. The school's policy was that a first time cell phone violation results in a warning; a second violation results in the confiscation of the phone, which can only be retrieved if the student's parent goes to the school to pick it up. The third violation results in the phone being confiscated until the end of the school term.

After Alex's phone was confiscated, he tried to retrieve it from the assistant principal's office during a break in his school day, but was told he could only retrieve the phone if he came back to the office with his older brother, who was also his guardian. However, by the time Alex arrived at the assistant principal's office with his brother later that day, she had gathered additional information which caused her to conclude Alex would not be allowed to retrieve his phone until the end of the school term.

During their meeting with the assistant principal, Alex and his brother sat in chairs on one side of the assistant principal's desk, and she sat on the other. Alex, who had a skateboard with him, was seated almost directly across from the assistant principal, with his brother seated to Alex's right. A thin computer monitor was positioned near one end of the desk, just to the side of Alex and the assistant principal.

The meeting started out cordially, but when the assistant principal informed Alex he would not be getting his cell phone back until the end of the term, he became upset, and began using profanity. Alex felt it was unfair that he had been told earlier he would get his phone back if he came in with his brother, and then when he did that, the punishment was changed. Alex's brother tried to calm him down, but to no avail. The

assistant principal called the school secretary, and just as she was doing that, Alex either "lunged" the skateboard toward her or "meant to throw it" at her.

The skateboard hit the edge of the computer monitor, knocking it down. The assistant principal believed Alex "possibly wanted to hurt [her]," but she could not say she was "close to getting hit," or how close the skateboard actually got to her. She could not say the skateboard was thrown "at [her] head." She believed it was thrown "towards [her] but . . . wouldn't be able to tell you what part of the body." She did believe that if the skateboard had not hit the edge of the monitor, it would have hit her.

On cross-examination, the assistant principal acknowledged she could not say for sure the skateboard was not just "jabbed or lunged" at the monitor. She recalled seeing only the flat top of the skateboard coming toward her, so that it was possible Alex continued holding onto it by the wheels.

The computer monitor was still functional after being knocked over by the skateboard. And although the assistant principal was not sure if the monitor was scratched as a result of being hit by the skateboard, she remembered it had not been damaged or scratched prior to the incident. A police officer testified that following the incident, the monitor had "slight damage" consisting of "little dents, scratches, honestly nothing really significant." That damage was "consistent with the blunt object hitting the monitor."

At the conclusion of the prosecution's case at trial, Alex moved to dismiss all three counts alleged in the petition pursuant to Welfare and Institutions Code section 701.1, based on insufficiency of the evidence. His primary argument with respect to the assault charges was that the evidence demonstrated he was only four feet away from the assistant principal at the time of the incident, and the computer monitor was to the side of both of them. The fact that his skateboard hit the computer monitor, rather than the assistant principal, demonstrates he was not making any significant effort to hit her.

In response, the prosecutor argued the evidence was sufficient to demonstrate Alex intended to hit the assistant principal, rather than the monitor, but that even if his intent had been to strike the monitor, that would still demonstrate an assault, because striking the monitor created an "undue risk to the victim who is in the near vicinity." The prosecutor also asserted the skateboard qualified as a deadly weapon due to its weight, size, and the metal pieces on its underside, and the manner in which Alex "lunged the skateboard or threw the skateboard . . . would also be consistent with an act that could cause great bodily injury." Finally, the prosecutor noted that even if the court were to find the evidence insufficient on the elements of deadly weapon and great bodily injury, Alex's conduct still constituted a "simple assault" because the threat of only "the slightest touching" is required for that offense.

After hearing those arguments from both sides, the court stated: "With regard to likely to produce great bodily injury, I think that the . . . evidence for that particular element is a little lacking. The witness, who I generally found very credible, was not particularly certain as to how the skateboard would have hit her. We spent a fair amount of time discussing whether it would have hit her in the face, in the head, and she was just unsure. So unless you can point me to some other evidence, my inclination or tentative is not to find that." And with respect to count 1, the court noted "simple assault is a lesser included for [aggravated assault with a deadly weapon]. So if you [addressing the prosecutor] could help me with count 1 and why the court should sustain the count 1 instead of the lesser included, that might be helpful to me."

The prosecutor responded by again pointing out that Alex's skateboard weighed five pounds, had metal parts that attached the wheels to the board, was a "blunt object," and thus, "by its nature" is an object that "could cause significant harm." He also noted it had been used with enough force to knock the monitor down.

The court then asked if the charge of aggravated assault with a deadly weapon could be sustained if "we take the issue of the amount of harm out of it." The court noted that while it appeared undisputed Alex had control of the skateboard, and took some action with it, "I don't know if that was going to leave a bruise, break a bone, result in death or some other great bodily injury, and that part I cannot say."

The prosecutor responded, "I think the proper inquiry would be looking at the object that was used for the assault and if that object . . . could possibly cause that injury, and I think we have that here."

The court then denied the motion to dismiss as to count 1, alleging aggravated assault with a deadly weapon (and count 3 alleging vandalism), but granted it as to count 2, alleging assault by means of force likely to produce great bodily injury.

Alex's older brother testified on behalf of the defense. He stated that after Alex began calling the assistant principal names, she asked him to leave the room before she called security. The older brother stood up and said, "Let's go" to Alex, and just as he was turning away to leave, Alex "jabbed her computer screen with his skateboard." The skateboard "didn't leave [Alex's] hand," until his brother "ripped it from his hand."

After the close of evidence, the court stated that it found the assistant principal to be "very credible," and found Alex's brother to be credible as well, but explained that to the extent there were any inconsistencies between the testimony of those two witnesses, they were resolved in favor of the assistant principal. It then found that counts 1 and 3, alleging assault with a deadly weapon and vandalism were proven beyond a reasonable doubt. However, the court also granted defendant's motion to reduce count 1 to a misdemeanor, pursuant to Penal Code section 17, subdivision (b).

DISCUSSION

1. Denial of Motion to Dismiss the Count Alleging Assault With a Deadly Weapon

Alex first argues the court erred when it denied his motion to dismiss count 1, alleging aggravated assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1). We agree the court's finding that the prosecution failed to establish Alex had used his skateboard in a manner "likely to produce great bodily injury," disposed of the allegation that skateboard qualified as a "deadly weapon" as a matter of law, but we conclude the proper result would have been to reduce the charge in count 1 to the lesser included offense of simple assault as the prosecutor had argued in the alternative, rather than dismiss the count outright.

In ruling on a motion to dismiss under Welfare and Institutions Code section 701.1, the juvenile court is required to weigh the evidence, evaluate credibility, and assess whether the prosecution has proved the necessary elements of the charged crimes beyond a reasonable doubt. If the court concludes it has not, the juvenile is not obligated to defend the charge. "The Legislature clearly intended section 701.1 to be analogous to Penal Code section 1118. [Citation.] Thus, 'the rules and procedures applicable to section 1118 . . . apply with equal force to juvenile proceedings.' [Citation.] [¶] In an adult criminal nonjury trial, Penal Code section 1118 requires the trial court to weigh the evidence, evaluate the credibility of witnesses, and *determine that the case against the defendant is 'proved beyond a reasonable doubt before [the defendant] is required to put on a defense*.' [Citation.] This is clearly the standard for the juvenile court as well." (*In re Andre G.* (1989) 210 Cal.App.3d 62, 65-66, italics added; fn. omitted.) A defendant moving to dismiss at the close of the prosecution's case need not state any particular grounds, or explain how the evidence is insufficient. (See *People v. Belton* (1979) 23 Cal.3d 516, 521-522.)

Here, in response to Alex's motion to dismiss, the court did weigh the evidence, and concluded the prosecutor had failed to establish beyond a reasonable doubt that Alex had wielded his skateboard in a manner "likely to produce great bodily injury" during the incident in question – it thus dismissed count 2 alleging assault by means of force likely to produce great bodily injury. However, in doing that the court also necessarily concluded the skateboard did not qualify as a "deadly weapon" for purposes of count 1arising out of in that same incident.

For purposes of Penal Code section 245, subdivision (a)(1), "'a deadly weapon' is 'any object, instrument, or weapon *which is used in such a manner as to be* capable of producing and *likely to produce, death or great bodily injury*.'" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029, italics added (*Aguilar*).)

"The Supreme Court has explained section 245 contemplates two categories of deadly weapons: In the first category are objects that are 'deadly weapons as a matter of law' such as dirks and blackjacks because 'the ordinary use for which they are designed establishe[s] their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury.' [Citations.] For example, a bottle or a pencil, while not deadly per se, may be a deadly weapon within the meaning of section 245, subdivision (a)(1), when used in a manner capable of producing and likely to produce great bodily injury." (*People v. Brown* (2012) 210 Cal.App.4th 1, 6-7.)

When the weapon is not one that qualifies as deadly per se, "the trier of fact may consider the nature of the object, the manner in which it was used, and all other facts relevant to the issue" in deciding whether its use was likely to produce great bodily injury or death. (*Aguilar, supra*, 16 Cal.4th at p. 1029.)

In this case, the "weapon" used by Alex was a skateboard. As the Attorney General concedes, "a skateboard is not deadly per se." Thus, under *Aguilar*, its

characterization as a deadly weapon is dependent upon whether it was used in a manner both capable of producing *and* "likely to produce great bodily injury." (*People v. Brown*, *supra*, 210 Cal.App.4th at p. 7.) But as Alex points out, the juvenile court expressly concluded the evidence was insufficient to sustain such a finding when it ordered dismissal of count 2 alleging assault by means of force likely to produce great bodily injury.

The Attorney General argues the court's dismissal of count 2 did not necessarily preclude the characterization of Alex's skateboard as a deadly weapon in this case, because the test for determining whether a weapon that is not deadly per se can nonetheless qualify as a "deadly weapon" for purposes of Penal Code section 245, is slightly different than the one stated in *Aguilar*. Quoting *People v. Graham* (1969) 71 Cal.2d 303 (*Graham*), the Attorney General claims that "'[w]hen it appears . . . that an instrumentality . . . *is capable of being used* in a 'dangerous and deadly' manner, and it may be fairly inferred from the evidence that its possessor *intended* on a particular occasion *to use it as a weapon* should the circumstances require, . . . its character as a 'dangerous or deadly weapon' may thus be established, at least for the purposes of that occasion.'" (*Id.* at p. 328, italics added.)

However, as *Graham* predates *Aguilar* by nearly 30 years, it must be disregarded to the extent it states a rule inconsistent with *Aguilar*. Moreover, the Attorney General's effort to use *Graham* as a means of substituting the concept of how an instrument *could be used* as a weapon, for the concept of how it actually *was used* on the occasion in question, would effectively erase the distinction between weapons that are deadly per se, and those that are not. For example, in *People v. Page* (2004) 123 Cal.App.4th 1466, the court held that when a defendant held a pencil against the victim's neck, it qualified as a deadly weapon for purposes of Penal Code section 245, because the imminent threat was that the pencil would be used to stab the victim in the neck. (*Id.* at

pp. 1468, 1472-1473.) Used in that fashion, a pencil could fairly be characterized as likely to produce great bodily injury. However, just because a pencil is *capable of being used* in a deadly manner does not mean that all pencils used as weapons would automatically be considered deadly, in the manner of a dirk or blackjack. If that were true, the act of whacking someone with a pencil during a momentary fit of pique would constitute an assault with a deadly weapon. That is not the law.

The same rule applies here. While we could certainly agree that a skateboard, wielded with sufficient force, might qualify as a deadly weapon, that does not mean every use of a skateboard as a weapon automatically qualifies as such, especially in a case such as this one where the trial court expressly determined the prosecutor failed to demonstrate its use was likely to produce great bodily injury.

Based on the foregoing, we agree with Alex that the juvenile court's determination the evidence was insufficient to demonstrate his use of the skateboard during the incident at issue was likely to result in death or great bodily injury for purposes of count 2, also precluded a determination that the skateboard qualified as a deadly weapon for purposes of count 1. However, that does not mean the court was obligated to dismiss that count outright. When considering a motion to dismiss, "the trial judge is entitled to consider whether, although the evidence is insufficient to establish the commission of the crime specifically charged in the accusatory pleading, the evidence is sufficient to sustain a conviction of a necessarily included offense which the evidence tends to prove. A defendant may be convicted of a lesser offense if he was charged with a felony which included the lesser offense." (*People v. Wong* (1973) 35 Cal.App.3d 812, 828.) Here, simple assault (Penal Code § 240) is a lesser included offense to the charged offense of assault with a deadly weapon, and proof of that offense was not affected by a determination that Alex's skateboard was not a deadly weapon.

Alex also argues, however, that even simple assault was not supported by substantial evidence. Because this assertion goes beyond the application of the juvenile court's own finding made in the context of the motion to dismiss, we apply the substantial evidence standard of review. Under the substantial evidence standard of review, '"[a]ll conflicts in the evidence must be resolved in favor of the respondents and all legitimate and reasonable inferences must be indulged in to uphold the judgment."' (*In re Brittany H.* (1988) 198 Cal.App.3d 533, 549.) According to Alex, the evidence adduced at the trial was insufficient to demonstrate his intention was to hit the assistant principal with the skateboard, because the only thing he actually hit was the computer monitor, which was situated to the side of both of them. However, the assistant principal testified the skateboard was thrown or lunged "towards [her]" and that if it had not hit the monitor, it would have hit her. That is sufficient evidence to support a finding that Alex was attempting "to commit a violent injury on the person of another." (Penal Code § 240.)

2. Sufficiency of the Evidence to Support Vandalism

Alex also claims the evidence was insufficient to support a finding he committed vandalism on the assistant principal's computer monitor in this case. We disagree. Misdemeanor vandalism occurs when a person maliciously inflicts "damages" to "real or personal property not his or her own." (Pen. Code, § 594, subd. (a).) Alex argues "damage" is commonly understood to mean inflicting harm on an object "'so as to impair its value, usefulness, or normal function,'" and since there was no evidence the computer monitor's usefulness or function were impaired, there is no evidence of damage. However, as the Attorney General points out, Alex's argument plainly ignores the word "value" in his own definition of damage.

The evidence before the court was sufficient to establish the computer monitor was scratched and dented after Alex struck it with his skateboard, and it had not even been scratched before the incident. The juvenile court could properly conclude that visible scratches and dents on a computer monitor would qualify as "damage" to the monitor.

Alex also suggests the police officer who testified to the scratches and dents was not particularly credible, especially since the assistant principal herself did not recall if the monitor was scratched or dented after the incident, but we cannot entertain such arguments on appeal. "[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the [decision] is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

3. Probation Condition

Alex next argues the court erred by requiring that his driver's license be delayed, suspended or restricted for a year, as a condition of probation. He acknowledges that Vehicle Code section 13202.6, subdivision (a)(1), mandates that "[f]or every conviction of a person for a violation of Section 594, 594.3, or 594.4 of the Penal Code, committed while the person was 13 years of age or older, the court *shall suspend the person's driving privilege for not more than two years*, except when the court finds that a personal or family hardship exists that requires the person to have a driver's license for his or her own, or a member of his or her family's, employment, school, or medically related purposes." (Italics added.)

Alex nonetheless contends the court abused its discretion by complying with this statutory requirement, because "[i]n making a decision to impose such a restrictive condition, there must be some nexus between the crime of which the minor was found to have committed and the use of a motor vehicle in the commission thereof." We reject the assertion. Vehicle Code section 13202.6 requires no "nexus" between the commission of vandalism and the use of a car. And while the court may have significant discretion in deciding which probationary terms to impose in a juvenile delinquency case, that discretion does not allow it to disregard the explicit requirements of a statute.

4. Defining a Maximum Term of Confinement

Finally, Alex contends the court erred by setting a "maximum term of confinement" for his offenses, which was established to be one year, four months. According to Alex, this provision must be stricken from the dispositional order because Welfare and Institutions Code section 726 requires the court to specify a maximum term of confinement only in cases where "the minor is removed from the physical custody of his or her parent of guardian as the result of an order of wardship pursuant to [section] 602." (Welf. & Inst. Code, § 726, subd. (d)(1).)

But in this case, Alex *was* removed from his guardian's custody. He was sentenced to two days in juvenile hall, with credit for two days already served. Consequently, we find no error in the court's inclusion of this provision in its order.

But even if it were erroneous, as the Attorney General points out, the inclusion of a maximum term of confinement in a juvenile delinquency dispositional order is not prejudicial, because if "the minor violates the terms of his probation, a further noticed hearing will have to be held before he is subjected to a modified disposition removing him from his parents' custody." (*In re Ali A.* (2006) 139 Cal.App.4th 569, 573-574.) "[T]hen at *that* time the juvenile court will have to comply with section 726(c) and,

if applicable, section 731(b) in setting and/or declaring the maximum term of physical confinement. In the meantime, the maximum term of confinement contained in the current dispositional order is of no legal effect. Because the minor is not prejudiced by the presence of this term, there is no basis for reversal or remand." (*Id.* at p. 574, fn. omitted.) Because the error, if any, is not prejudicial, it provides no basis for relief.

DISPOSITION

The judgment is modified to reflect a true finding of simple assault, rather than assault with a deadly weapon, on count 1 of the petition. In all other respects, the judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.